



26-29 NOVEMBER 2018
Dubai World Trade Center
11:00 - 19:00 Daily

**Baker
McKenzie
Habib Al Mulla.**

Topic: Project Finance and Project Management

Arbitration and Dispute Resolution in Construction Claims



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Main causes of construction disputes

Distinguish between Conflict (incompatibility of interests) and Disputes.

Various categories of disputes and causes thereof. Some are more common than others.

Category of Disputes	Causes of Disputes	Category of Disputes	Causes of Disputes
Owner related	variations initiated by the Owner – Part of scope?	Contract related	ambiguities in contract documents
	change of scope – design, construction, operation		different interpretations
	late giving of possession – site, permits, PTWs		risk allocations
	acceleration – reluctance by Contractor	Human behaviour	adversarial / various cultural approaches to conflict
	payment delays – format of IPCs, invoices.		lack of communication
Contractor related	delay – culpable or concurrent Delay	Project related	failure to keep records
	request for extension of times – refused by the Owner		site conditions, soil
	financial failure of the Contractor – lack of resources	External factors	weather, e.g. offshore wind turbines
	quality of works - defects		regulatory: recruit from local work force. economic: lack of funding after commencement of work
Design related	incomplete specs or tender drawings, availability of information.		

The most common causes of disputes are contractor-related. Reasons: Powerful party, can stop or suspend the works, wants to limit costs and/or gain more profits.



Main causes of construction disputes (ctd)



Common pitfalls causing construction disputes:

1. Structure of the Project Company, or Main Contractor: JVs administering contracts almost always end up in dispute. PPP model is economically irrational: inability to forecast demand accurately, resulting in significant losses to private sector.
2. Failing to properly administer the contract – comply with notice requirements, keeping up and updating the programme. Using risk registers and proactive project management techniques to identify project risks as early as possible.
3. Backpedalling certain obligations: e.g. personal guarantee required for project finance.
4. Claims errors: poorly drafted, incomplete or unsubstantiated claims for e.g. EOT, variation (event causing delay or variation, value, time impact analysis).



Main causes of construction disputes in the Middle East



- Ongoing Economic Crisis and liquidity issues in the Middle East construction market led to very active claims and disputes market in 2016 and 2017.
- World Bank: Potential market recovery through regional growth, which is projected to increase steadily after 2017 to 3.0 percent in 2018 and 3.2 percent by 2020.
- Demand for oil from Asia and local market consumption have increased the investment in certain projects: oil and gas, water projects, solar power.
- Key findings:
 1. Basic contract understanding is still at the heart of most disputes.
 2. Proper contract administration is still key to avoiding disputes - Construction management.



What is the preferred dispute resolution method in the construction industry?



Various preferred methods. **Arbitration tops the list**

- Four fundamental reasons:
 1. Efficiency of time;
 2. Confidentiality of proceedings and award;
 3. Parties' choice: Control over the process and rules governing the proceedings;
 4. Easier to enforce award abroad (NY Convention).
- Other dispute resolution mechanisms:
 1. Court Litigation;
 2. Mediation;
 3. Adjudication or DAB;
 4. Expert determination under ICC Rules for the Administration of Expertise Proceedings.
- Availability of various arbitration hubs in the GCC: arbitration centers, infrastructure, modern arbitration laws and arbitration friendly forums.

What is the preferred dispute resolution method in the construction industry? (Ctd)



- Distinction between the place and seat of arbitration
- Impact of the choice of seat of arbitration
- Choice of institutional arbitration vs *ad hoc* arbitration
- Choice of arbitrators – Qualifications: Common or civil lawyers, experts in the industry, awareness and experience in the governing laws.
- Choice of experts – Programmers, Quantity Surveyors. All depends on the claims. Expert engagement is vital, especially in active projects.





Outline of an arbitration procedure

1. Notice of intention to refer to arbitration – Compliance with pre-arbitral steps: Negotiation, mediation, DAB;
 - FIDIC Works of Civil Engineering Construction (Fourth Edition 1987 Red Book) – Clause 67
 - FIDIC Conditions of Contract for Construction (First Edition 1999 Red Book) – Clause 20
 - FIDIC Conditions of Contract for Construction (Second Edition 2017 Red Book) – Clause 21
2. Timely service of the Notice of Dispute to the address identified in the contract with clear reference to the notice clause;
3. Initiation of the arbitration in a timely fashion by filing the Request for Arbitration (RFA) before the proper arbitration centre;
4. Appointment of the Arbitral Tribunal;
5. Attendance of the Case Management Conference / Preliminary Hearing;
6. Agreement on the Terms of Reference (TOR) and the Procedural Timetable;
7. Filing of each party's Pleadings on the merits along with any Expert and/or Witness Evidence;
8. Attendance of the Final Hearing;
9. Post-Hearing Submissions by the parties, if any;
10. Cost Submissions by the parties;
11. Final Award rendered by the Arbitral Tribunal.

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